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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN RUBEN MAGALLON,

Defendant and Appellant.

2d Crim. No. B203551
(Super. Ct. No. 2007004845)
(Ventura County)

Steven Ruben Magallon appeals the judgment entered after a jury convicted him of street terrorisim (Pen. Code, § 186.22, subd. (a)),[1] vandalism over $400 (§ 594, subd. (b)(1)), and possession of a deadly weapon (§ 12020, subd. (a)). The jury also found true allegations that the vandalism and weapon possession offenses were committed for the benefit of a gang (§ 186.22, subd. (b)(1)). Appellant admitted he had suffered a prior strike conviction and served a prior prison term (§§ 667, subds. (c)(1) & (e)(1), 667.5, subd. (b), 1170.12, subds. (a)(1) & (c)(1)). He was sentenced to 11 years 8 months in state prison. He contends (1) the evidence is insufficient to support his convictions for vandalism and possession of a deadly weapon; (2) the trial court erred in giving CALCRIM No. 2500; (3) the jury was erroneously instructed on accomplice liability; (4) the court violated section 654's prohibition against multiple punishment; and

[1] All further undesignated statutory references are to the Penal Code.

(5) the court erroneously determined that section 654 did not apply and imposed consecutive sentences in violation of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*). We affirm.

STATEMENT OF FACTS

On August 19, 2006, Jose and Darlene Hernandez had a party for their 14-year-old son's baseball team at their home on South G Street in Oxnard. At 12:40 a.m., all of the children were in the front yard when a blue Ford Expedition pulled up. After the female driver was heard saying, "They are just little kids," someone else in the car yelled, "South Side Chiques" and "Colonia" as two men got out. One of the men, later identified as appellant, exited the front passenger seat holding a red baseball bat and yelled something about "Chiques" as he approached the children. After all the children ran in the house, they heard glass shattering. Jose[2] heard a loud bang that sounded like shots being fired. As Darlene called 911, Jose went outside and saw that a bedroom window on the front of the house had been broken. Oxnard Police Officer Sheylan Flannery responded to the scene and determined that the window had been smashed with a baseball bat. The Hernandez family paid $1,070 to have the window boarded up and replaced.

Around 11:30 p.m. the same night, Officer Manuel Vega was patrolling when he saw a blue Ford Expedition turn onto Bard Road from J Street. Officer Vega responded when some people on the corner called out that the Expedition's occupants had just thrown bottles at a neighbor's house while yelling "Colonia." After the officer was unable to locate the Expedition, he went to the house where the bottles had reportedly been thrown. Officer Vega, who recognized one of the men standing in the driveway as a South Side gang member, was investigating the scene when a drunk driver crashed behind him. As the officer was transporting the drunk driver to the station, he heard a

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2 We refer to the Hernandezes by their first names for ease of reference, and intend no disrespect.

radio alert for a large blue SUV. A few minutes later, Officer Vega saw the Expedition he had seen earlier driving slowly with its lights turned off. When the officer began driving toward the Expedition, it sped away. After the officer activated his emergency lights, the Expedition pulled over. Officer Vega approached with his gun drawn and ordered the occupants to remain in the vehicle while he called for backup. Appellant was in the front passenger seat. Lorena Gutierrez was the driver, and Marianne Zuniga, Alex Rodriguez, David Rosales, and Jaime Cardenas were in the back seat. A red baseball bat embedded with small shards of glass was recovered from behind the rear seat.

Officer Flannery brought 14-year-old Antonio Franco to the Expedition for an in-field showup. Franco, who was in the Hernandezes' front yard when the incident occurred, identified appellant as the individual he had seen exiting the Expedition's front passenger seat holding a baseball bat. Franco also positively identified the Expedition, as well as the other man who had gotten out of the vehicle that night.

Gutierrez testified that she lived on the north side of Oxnard and had associated with the Colonia Chiques (Colonia) gang all her life. At about 11:00 p.m. on August 19, 2006, Gutierrez agreed to give several people a ride from a party on Hill Street to the south side of Oxnard. Appellant sat in the front passenger seat of Gutierrez's Expedition, while Marianne Zuniga and three other men sat in the back. The passengers asked Gutierrez to stop at an alley near J and Bard Streets. After one of the men got out to urinate, appellant yelled, "Colonia." Because they were in the South Side gang's territory, Gutierrez knew that shouting "Colonia" meant "[l]ooking for trouble."

Around midnight, Gutierrez's passengers told her to stop at the 4400 block of G Street. As soon as she stopped, all of the men exited the vehicle and approached a group of children in a front yard. When Gutierrez told them "to stop, that there were kids," the men yelled "Colonia." Gutierrez drove a half block away and parked. After she heard glass breaking, the men ran back to her car and told her to leave. Appellant sat in the front passenger seat again. According to Gutierrez, one of the men in the back seat had a bat in his hand. Gutierrez was pulled over by the police a few minutes later.

Appellant was interviewed at about 1:20 a.m. that morning by Officer Todd Johnson. When asked if he had any Colonia tattoos, appellant showed his five-point star tattoos on his right hand and shoulders and a "Colonia" tattoo on his stomach. Appellant admitted he was a member of the Colonia gang and said his moniker was "Lil' Troubles."

Officer Floriano interviewed Gutierrez at her residence on February 17, 2007. Gutierrez acknowledged that she was known as "G Street Lorena" and had "E" and "S" tattoos on her fingers that stood for "East Side." She admitted knowing about the Colonia gang, and had several items in her home with the Dallas Cowboys logo.

Oxnard Police Detective Ken Peeples testified as a gang expert on behalf of the prosecution. Detective Peeples testified that the Colonia gang has over 900 members and is the largest gang in Ventura County. The gang's main rival is the South Side Chiques (South Side), which has over 300 members and is the second largest gang in Oxnard. Colonia's common symbols include the letters "E" and "S" for "East Side." The gang has adopted the Dallas Cowboys' five-point star and colors. Tattoos commonly associated with the gang include the five-point star and "Colonia." Colonia's primary activities include vandalism, assault, robbery, narcotic sales, and car theft.

Detective Peeples testified that a person becomes a Colonia member by "getting jumped in, crimed in or born into the gang." A person who wants to get out of the gang must sever all ties with the gang. Gaining respect within one's own gang and among rival gangs and instilling fear and intimidation in the community are of primary importance. Gang members with the most respect have greater status within the gang, and further increase their status by committing crimes for the gang's benefit. Two Colonia members committed assault with a deadly weapon in 2003, while in 2006 another member committed the crimes of witness intimidation, carrying a loaded firearm, and violating the Colonia gang injunction.

Based on appellant's tattoos and admissions and other information, Detective Peeples opined that appellant, Zuniga, Cardenas, Rodriguez, and Rosales were all active members of the Colonia gang. The detective further opined that a group of

Colonia members driving on the south side of town and yelling "Colonia" at a group of people intend to challenge or disrespect their South Side rivals. Colonia members commonly carry baseball bats as weapons, and commit a crime for the gang's benefit by smashing windows while yelling the gang's name.

DISCUSSION

I.

Sufficiency of the Evidence

Appellant contends the evidence is insufficient to support his convictions for assault with a deadly weapon and vandalism. According to appellant, a baseball bat cannot qualify as a deadly weapon under subdivision (a)(1) of section 12020, unless it is altered in some fashion. As to the vandalism count, he argues that the evidence identifying him as the perpetrator was fatally inconsistent. We reject both claims.

In reviewing claims of insufficient evidence, """. . . we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence - that is, evidence that is reasonable, credible, and of solid value - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]"' [Citation.] . . . '[W]e presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.' [Citation.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

Subdivision (a)(1) of section 12020 expressly prohibits the possession of "any instrument or weapon of the kind commonly known as a . . . billy . . . ." When the factual characteristics of an item are not disputed, the determination whether an item is "commonly known" as one of the items identified in subdivision (a)(1) of section 12020, is a question of law. (*People v. Mayberry* (2008) 160 Cal.App.4th 165, 169, fn. 5.)

The law belies appellant's assertion that an unaltered baseball bat cannot qualify as a deadly weapon under section 12020, subdivision (a)(1). Our Supreme Court has recognized "that an item commonly used for a nonviolent purpose, *such as a baseball bat* or a table leg, [can] qualify as a billy, but only 'when the attendant circumstances,

including the time, place, destination of the possessor, the alteration of the object from standard form, and other relevant facts indicated that the possessor would use the object for a dangerous, not harmless, purpose.' [Citation.]" (*People v. King* (2006) 38 Cal.4th 617, 624, italics added.) Appellant refers to a case in which an altered baseball bat was found to constitute a billy (*People v. Grubb* (1965) 63 Cal.2d 614, 620-621, superseded by statute on other grounds as stated in *People v. Rubalcava* (2000) 23 Cal.4th 322, 329-331), yet the altered state of the bat was merely one of the attendant circumstances indicating that the defendant would use it for a dangerous purpose (*ibid.*). The court reasoned that the Legislature, in enacting section 12020, had intended to prohibit "the possession of ordinarily harmless objects when the circumstances of possession demonstrate an immediate atmosphere of danger. Accordingly the statute would encompass the possession of a table leg, in one sense an obviously useful item, when it is detached from the table and carried at night in a 'tough' neighborhood to the scene of a riot. On the other hand the section would not penalize the Little Leaguer at bat in a baseball game." (*Id.* at p. 621.) While appellant correctly notes that the bat he was convicted of possessing was unaltered, he ignores all of the attendant circumstances indicating that he not only possessed the bat as a weapon, but used it as such. That evidence is sufficient to support his conviction under section 12020, notwithstanding the fact that he could have possessed the bat for an innocent purpose.

The evidence is also sufficient to sustain appellant's conviction for vandalism. Antonio Franco identified appellant at an in-field showup as the individual who got out of the Expedition holding a baseball bat. Another eyewitness stated that the front passenger holding the baseball bat was wearing glasses, and appellant was the only person in the Expedition with glasses. Shortly after appellant was seen exiting the Expedition holding a bat, witnesses heard someone breaking one of the Hernandezes' windows. Only one bat was subsequently found in the Expedition, and it was embedded with shards of glass. The jury could infer from this evidence that appellant was the person who vandalized the Hernandezes' property by breaking their window.

In his opening brief, appellant notes that Franco was unable to confirm his extrajudicial identification of appellant at trial, then quotes *People v. Gould* (1960) 54 Cal.2d 621, for the proposition that "[a]n extrajudicial identification that cannot be confirmed by an identification at the trial is insufficient to sustain a conviction in the absence of other evidence tending to connect the defendant with the crime." (*Id.* at p. 631.) In a supplemental brief, he acknowledges that *Gould* was expressly overruled on this very point in *People v. Cuevas* (1995) 12 Cal.4th 252, 257, 260-275. Pursuant to *Cuevas*, "the sufficiency of an out-of-court identification to support a conviction should be determined under the substantial evidence test . . . that is used to determine the sufficiency of other forms of evidence to support a conviction." (*Cuevas*, at p. 257.) Appellant's efforts to undermine the reliability of Franco's out-of-court identification and highlight purported inconsistencies in other eyewitness testimony are unavailing in light of the applicable standard of review.

II.

CALCRIM No. 2500

Appellant asserts that the version of CALCRIM No. 2500 that was given to the jury violated his due process rights.**3** Specifically, he argues that the court erred by

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3 The jury was instructed as follows: "The defendant is charged in Count Three with unlawfully possessing a weapon, specifically a baseball bat. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant was in possession of a baseball bat. [¶] 2. The defendant knew that he was in possession of a baseball bat; [¶] AND [¶] 3. The defendant was in possession of the baseball bat as a weapon. When deciding whether the defendant was in possession of the baseball bat as a weapon, consider all the surrounding circumstances relating to that question, including when and where the object was possessed, where the defendant was going, and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose. [¶] The People do not have to prove that the defendant used the baseball bat as a weapon. The People do not have to prove that the baseball bat was concealable, or carried by the defendant on his person, or displayed or visible. [¶] Two or more people may possess something at the same time. A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person. [¶] You may not

(1) referring to the weapon as a baseball bat instead of a billy; (2) omitting any reference to whether the bat or billy was modified from its standard form; (3) including a provision that the People did not have to prove that he intended to use the bat or billy as a weapon; and (4) including a provision that applies only when a defendant is charged with possessing multiple weapons.

The trial court has a sua sponte duty to instruct on the general principles of law relevant to the issues raised by the evidence, including the elements of all charged offenses. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) Instructional error is not determined by isolated parts of the instructions or from a particular instruction. (*People v. Smithey* (1999) 20 Cal.4th 936, 963-964.) Rather, we read the jury instructions as a whole to determine whether there is a reasonable likelihood that they confused or misled the jury. (*People v. Hughes* (2002) 27 Cal.4th 287, 341.) Failure to properly instruct on a single element of a crime may not compel reversal where "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' [Citations.]" (*People v. Harris* (1994) 9 Cal.4th 407, 424-425.)

We discern no error in the instruction of which appellant complains. The determination whether the baseball bat appellant was convicted of possessing qualified as a "billy" under section 12020 was encompassed in the instruction as a whole. As we have explained, a baseball bat may qualify as a billy when the attendant circumstances indicate that the defendant possesses it for a dangerous purpose (*People v. King, supra,* 38 Cal.4th at p. 624), and the jury was instructed accordingly. We have also explained that the jury did not have to find that the bat was altered in order to find appellant guilty of violating section 12020. Moreover, it is undisputed that the bat was unaltered. Because the instruction would have been superfluous, any error in failing to give it was harmless. (*People v. Crew* (2003) 31 Cal.4th 822, 849.)

We also reject appellant's claim that the instruction erroneously included a

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find the defendant guilty unless all of you agree that the People have proved that the defendant possessed the baseball bat."

provision that the People did not have to prove he intended to use the bat as a weapon. Appellant invited any error by asking the court to include the provision. While the notes accompanying CALCRIM No. 2500 state that this portion of the instruction should be given only if the object he was charged with possessing was designed solely for use as a weapon, the instruction is a correct statement of the law in both contexts. (See *People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7 [recognizing that jury instructions and accompanying bench notes are not law].) Regardless of whether the object at issue is a weapon per se or capable of innocent uses, "[i]ntent to use a weapon is not an element of the crime of weapon possession. 'Proof of possession alone is sufficient.' [Citation.]" (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404.) The prosecution merely had to prove that appellant possessed the bat as a weapon, and the jury was so instructed. (*Ibid.*)

Appellant finally argues that the court gave a "truncated version" of a provision in CALCRIM No. 2500 that applies only where a defendant is charged with possessing multiple weapons. Although the instruction as given does not refer to multiple weapons, appellant claims that the conclusion of the instruction, "[y]ou may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed the baseball bat" is erroneous in that it "does not fulfill the objective of ensuring unanimity when multiple weapons are alleged as does the clause in the standard version." Appellant goes on to assert that the statement "puzzlingly suggests that possession of a baseball bat is sufficient to constitute the crime proscribed under Penal Code section 12020 if the jury is unanimous on the element of possession." Aside from the facts that appellant was not charged with possessing multiple weapons and the instructions made no reference to multiple weapons, the instructions as a whole plainly convey that the prosecution was required to prove that appellant possessed the bat as a weapon in order for him to be found guilty of violating section 12020. We presume the jury understood and followed those instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.) Appellant fails to show otherwise.

III.

Accomplice Testimony

In accordance with CALCRIM No. 334, the court instructed the jury that if it found Gutierrez was an accomplice, her testimony could be considered as evidence against appellant only if it was corroborated by independent evidence that tended to connect appellant to the crime. Appellant contends the court erred in failing to instruct the jury that the same limitation applied to Gutierrez's out-of-court statements. We reject this contention.

Our Supreme Court has held that the court has no sua sponte duty to modify the instruction to expressly refer to statements in addition to testimony. (*People v. Andrews* (1989) 49 Cal.3d 200, 215, overruled on other grounds in *People v. Trevino* (2001) 26 Cal.4th 237 [addressing former CALJIC No. 3.11, now CALCRIM No. 334].) While appellant notes the suggestion that courts *should* substitute "statements" for "testimony" when the prosecution relies in part on out-of-court statements (*Andrews,* at p. 215, fn. 11), *Andrews* expressly declined to find that the court has a sua sponte duty to do so. In any event, appellant fails to show that the jury would have construed the instruction to apply only to Gutierrez's trial testimony. Out-of-court statements of the kind at issue here technically qualify as accomplice "testimony" as contemplated by section 1111 (*People v. Williams* (1997) 16 Cal.4th 153, 245), and nothing that transpired at trial would have led the jury to conclude otherwise. In declining to impose the sua sponte duty appellant advocates, the Supreme Court reasoned: "The gist of those instructions was that accomplices were to be distrusted, and that their testimony could not furnish the sole basis for a conviction. Neither the trial court nor the parties ever suggested to the jury that, with respect to the corroboration requirement, it should distinguish between [the accomplice's] out-of-court and in-court statements." (*Andrews, supra,* at pp. 214-215, fn. omitted.) The same is true here.

IV.

Section 654

Appellant asserts that the court violated section 654's prohibition against multiple punishment by imposing consecutive sentences. We conclude that separate punishments were proper.

Section 654 "prohibits multiple punishment if the defendant commits more than one act in violation of different statutes when the acts comprise an indivisible course of conduct having a single intent and objective." (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

As a general rule, the trial court determines the defendant's "'intent and objective'" under section 654 by a preponderance of the evidence. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 266, 268-269.) "We review the court's determination of [appellant's] 'separate intents' for sufficient evidence in a light most favorable to the judgment, and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence. [Citation.]" (*Id.* at p. 271.)

Substantial evidence supports the trial court's finding that appellant harbored independent objectives in committing each of the crimes of which he was convicted. While appellant claims that the vandalism and possession of a deadly weapon were committed pursuant to a single intent and objective because "the bat only became a 'weapon' when it was used to shatter the windows," the evidence supports the conclusion that he possessed the bat as a weapon for purposes independent of the vandalism. The fact that appellant exited the Expedition with the bat in his hand as he made reference to his gang supports the inference that he possessed the bat with an intent to either intimidate or incite a violent response from those he was approaching. Moreover, the

prosecution's gang expert testified that Colonia members commonly carry baseball bats as weapons. The court could reasonably conclude from this evidence that appellant possessed the bat not only for the purpose of breaking the window, but also as a weapon to be used for any other purpose if the need arose.

The evidence is also sufficient to support the finding that appellant pursued separate intents and objectives in committing the vandalism and street terrorism. "[S]ection 186.22, subdivision (a) requires a separate intent and objective from the underlying felony committed on behalf of the gang. The perpetrator of the underlying crime may thus possess 'two independent, even if simultaneous, objectives[,]' thereby precluding application of section 654. [Citation.]" (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468, fn. omitted.) Applying section 654 under the circumstances "it would render section 186.22, subdivision (a) a nullity whenever a gang member was convicted of the substantive crime committed in furtherance of the gang." (*Id.* at p. 1468.)

Here, appellant not only committed vandalism, but did so with the intent to actively promote or assist his gang. While he may have pursued both objectives simultaneously, they were nonetheless independent of each other. Accordingly, the court was not required to stay appellant's sentence on the street terrorism count under section 654. (*In re Jose P., supra,* 106 Cal.App.4th at p. 471.)

V.

Apprendi and Cunningham

Appellant argues that the court violated his Sixth Amendment right to a jury trial under *Apprendi* and *Cunningham* by determining whether any of his terms should have been stayed under 654, and in thereafter imposing consecutive sentences. Our Supreme Court has expressly rejected both claims. (*People v. Black* (2005) 35 Cal.4th 1238, 1264 (*Black I*) [§ 654]; *People v. Black* (2007) 41 Cal.4th 799, 821-822 (*Black II*) [consecutive sentences].) In *Black I*, the court held: "For purposes of the right to a jury trial, the decision whether section 654 requires that a term be stayed is

analogous to the decision whether to sentence concurrently. Both are sentencing decisions made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense, and neither implicates the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense." (*Black I, supra,* at p. 1264.) *Cunningham* did not address section 654, nor did it overrule *Black I* on that issue. In *Black II,* our Supreme Court held that *Apprendi* and *Cunningham* do not apply to consecutive sentencing decisions. (*Black II, supra,* at pp. 821-822.) The United States Supreme Court also recently recognized that the Sixth Amendment does not apply to consecutive sentencing determinations. (*Oregon v. Ice* (2009) --- U.S. --- [129 S.Ct. 711].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Douglas W. Daily, Judge

Superior Court County of Ventura

Laini Millar Melnick, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels, Supervising Deputy Attorney General, Yun K. Lee, Deputy Attorney General, for Plaintiff and Respondent.